



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 31, 1996

Ms. Sheree L. Rabe  
Assistant City Attorney  
City of Georgetown  
City Attorney's Office  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR96-2019

Dear Ms. Rabe:

On behalf of the City of Georgetown (the "city"), you ask this office to reconsider our decision in Open Records Letter No. 96-1307 (1996). You also have received a new request for the same basic information as that addressed in 96-1307 (1996). Consequently, we will consider these requests together. These requests have been assigned ID#s 101463 and 101718.

Open Records Letter No. 96-1307 (1996) dealt with two requests for information. The first requestor sought the "names, usage, rate, and sales tax, if any, of your Business Account Customers." The second requestor sought the names and addresses of Georgetown Electric's business customers, the amount of the customers' most recent utility bill, and the amount of sales tax paid on the most recent bill. The new requestor seeks the "name, address, account number, total amount of last month's billing and total amount of State sales tax paid" of all "Commercial Accounts." You assert that sections 552.101, 552.104, and 552.110 of the Government Code authorize the city to withhold the requested information in each of these requests from required public disclosure.<sup>1</sup>

In Open Records Letter No. 96-1307 (1996), we concluded that, although a municipal utility is specifically authorized by statute to engage in competition, *see* Open Records Decision No. 593 (1991) at 4, the city demonstrated no competitive interest in withholding information related to nonresidential customers who are located in areas served only by the city and, therefore, section 552.104 of the Government Code authorized the city to withhold the requested information only to the extent it lists nonresidential customers located in areas not served exclusively by the city's utility company. You argue that this office failed to consider the other exceptions raised with respect to the requested

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<sup>1</sup>You originally asserted section 552.103, the "litigation exception," but now state that it is no longer applicable.

information as it pertains to these customers. We agree and now consider the other exceptions raised for each of the three requests.<sup>2</sup> In accordance with Open Records Lettter No. 96-1307 (1996), you may rely upon section 552.104 to withhold the same information from the most recent requestor.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).<sup>3</sup>

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<sup>2</sup>You also reurge your argument that section 552.104 of the Government Code excepts the information as it relates to nonresidential customers who are located in areas served only by the city. We do not believe that the city has demonstrated that release of this information may cause specific harm to the city's legitimate marketplace interests and, consequently, we specifically refuse to reconsider this exception as it relates to these customers.

<sup>3</sup>The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5. We have reviewed the responsive information submitted by the city, as well as the city's arguments against disclosure, and conclude that the city has failed to establish a prima facie case that this information is a trade secret. Therefore, you may not withhold this information as a "trade secret" under section 552.110.

Section 552.110 also excepts from disclosure "commercial or financial information" obtained from a person and confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office established that it would follow the *National Parks & Conservation Ass'n* test for judging the confidentiality of "commercial or financial information" which treats such information as confidential

if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

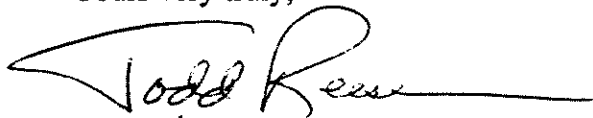
498 F. 2d at 770 (footnote omitted). Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). We conclude that the city has failed to establish that disclosure of the information is likely to either impair its ability to obtain necessary information in the future or cause substantial harm to its competitive position and, thus, has failed to establish that the second prong of section 552.110 is applicable. Therefore, we stand by the conclusion reached in Open Records Letter No. 96-1307 (1996). The city may not withhold the requested information as it relates to nonresidential customers who are located in areas served only by the city under section 552.110.<sup>4</sup>

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<sup>4</sup>In addition, we acknowledge the city's arguments under section 552.110 on behalf of the individual businesses located in areas served only by the city's electric company. However, we do not believe that the city has made a prima facie case that the information is a trade secret of any of these businesses, nor has the city shown that release of the information is likely to cause substantial harm to the competitive position of these businesses. Although we do not believe that the specific information requested may be excepted under section 552.110 in the situation at hand, the individual businesses whose proprietary interests you contend may be affected by this request may submit to this office their own arguments as to why the information should be withheld. See Gov't Code § 552.305(b).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID#s 101463, 101718

Enclosures: Submitted documents

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